No. 3953

# In the United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,

*Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et. al.,

*Appellees.*

## Answering Brief of McClintic-Marshall Company


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### STATEMENT OF THE CASE

By written contract, dated February 28, 1920, this appellant agreed to furnish to Scandinavian American Building Company all the terra cotta for the new building for the lump sum of $109,000. The contract was in the general form of printed

contracts put out by the Building Company, but certain of the provisions of that form were eliminated prior to the execution of the contract, e. g., the lien waiver clause, Article XIV.

None of the terra cotta was delivered to the building site. Thirteen thousand and thirty-five cubic feet out of a total of 24,180, required to fill the contract, was shipped from the appellant's works near Spokane, Washington, and piled in the yards of the Great Northern Railway Company at Tacoma. The balance, in various stages of completion, remained at the appellant's plant.

The questions presented are, broadly, two:

1st. Did the shipment to Tacoma of the materials stored in the Great Northern yards constitute a delivery, or furnishing sufficient to sustain a lien?

2nd. Can the appellant have a lien for specially manufactured materials without delivery to the premises on which the lien is claimed?

The questions of law are thus the same as are presented by the appeal of the Tacoma Millwork Supply Company, uncomplicated by the express waiver of lien. They will not be reargued at length, but we ask this court to refer to and consider on this appeal the argument made in the brief filed by us upon the appeal of Tacoma Millwork Supply Company.

The first question above stated naturally turns

in a large measure upon the special facts disclosed by the evidence. Upon them the District Court found that there was no delivery by the appellant to the Building Company, and that title to none of the terra cotta passed to the Building Company. It is admitted that the terra cotta was all to be specially manufactured for this building; that the contract called for delivery of it at the building site (Exhibit 139, Tr. p .813; testimony of M. L. Bryan, Tr. p. 798); that appellants were paid $20,000 before any material was shipped; that the first shipment was made September 17, 1920, and the last on January 13, 1921, (Tr. p. 811); that appellants secured the storage space, paid the rental thereon, and were liable to pay for the loading of the material and its transportation from the storage yard to the building site before they would have fully carried out their contract, and to replace any material that was damaged while in storage, (testimony of A. B. Fosseen, pp. 814, 815, 824 and 825). The reason for the shipment to Tacoma was partly the same as actuated the Tacoma Millwork Supply Company to move some of their material to down-town storage, to-wit, to avoid congestion at the factory, but more particularly to avoid the consequences of a threatened car shortage and an advance in freight rates.

In a letter of November 5, 1920, Mr. Fosseen, the president of the appellant, says:

"We are ready to make shipment of the

contract provided for installment payments as follows:

> "75% monthly, to be paid in cash of the estimated value of material delivered, and the balance of 25% to be paid within thirty to sixty days from the completion of this contract." (See Article I, Tr. p. 856.)

This $20,000 was paid August 13th upon an estimate of the value of the terra cotta that was finished and ready for shipment, but Mr. Fosseen states his inability to determine what became of the terra cotta 'that was completed, finished and ready for delivery at the time that the $20,000 was paid. Part of it is the terra cotta here in Tacoma, and probably a part of it is over there yet. I don't known what part of it is still over there at Spokane. I know that it is a part of the terra cotta that is in Tacoma that was collected on." (Tr. p. 821). But as will be seen by a reference to Exhibit 143, the estimate upon which the $20,000 was paid consists of two items, one terra cotta ready for shipment amounting to $14,140, the other terra cotta burned and being fitted, amounting to $15,360. The invoice, Exhibit 143, constituted a demand for seventy-five per cent of the total of these two items, and it was upon that estimate that the $20,000 was paid. It will be our contention on this point that in view of the fact that demand for an advance or installment payment was made in accordance with the terms of the contract, and the

further fact that the invoice constituting such demand specified a certain quantity of material that was ready or practically ready for shipment, that it will be presumed that the shipments thereafter made were from this material which was then ready for shipment, and that the payment should be applied upon the material thus shipped, with the result that from the value claimed for the material delivered here in Tacoma the payment of $20,000 must be deducted in fixing the amount for which a lien is to be allowed if such shall be the ultimate holding of this court.

## POINTS AND AUTHORITIES

### I. Effect of Courts Findings

1. FINDINGS OF FACT IN AN EQUITABLE ACTION, MADE BY THE JUDGE WHO HEARD THE TESTIMONY, WILL NOT BE REVERSED EXCEPT IN A CLEAR CASE.

> "While in an equity proceeding of this character an appeal practically affords the litigants a retrial of the questions presented, nevertheless the findings of fact made by the trial court will be accorded great weight. The appellate court will not usually disturb them unless they are clearly erroneous, or there is a preponderance of evidence against them."

*Idaho Mining & Milling Co. vs. Davis*, 123 Fed. 396, at 397 (C. C. A. 9th Cir.) (Per Morrow, C. J.)

*Remingtons 1922 Comp. Stat. of Wash.*, Sec. 1129.

2. THE LIEN STATUTE BEING IN DEROGATION OF THE COMMON LAW MUST BE STRICTLY CONSTRUED IN DETERMINING THE PARTIES BENEFITED THEREBY.

*Tsutakawa vs. Kumamoto*, 53 Wash. 231, at p. 236; 101 Pac. 869.

3. A FEDERAL COURT IN ENFORCING A STATUTORY REMEDY IN THE STATE IN WHICH IT SITS IS BOUND BY THE CONSTRUCTION OF THAT STATUTE PLACED THEREON BY THE HIGHEST COURT OF THE STATE.

*Detroit vs. Osborne*, 135 U. S. 492; 34 L. Ed. 260;

*Northern Pacific Ry. Co. vs. Meese*, 239 U. S. 614 60 Law. Ed. 467 at 468, reversing 211 Fed. 254;

*Loewe vs. Savings Bank*, 236 Fed. 44, affirmed 61 Law. Ed. 360;

*In re Seward Dredging Co.*, 242 Fed. 225; Certiorari denied, 245 U. S. 651; 62 Law. Ed. 531;

*Columbia Digger Co. vs. Sparks*, 227 Fed. 780 (C. C. A. 9th Cir.);

*American Surety Co. vs. Bellingham Nat'l Bank*, 254 Fed. 54. (C. C. A. 9th Cir.);

*Bank of Follansbee vs. Follansbee Lbr. Co.*, 248 Fed. 645;

25 C. J. Federal Courts, p. 832, and cases there cited.

4. TE SUPREME COURT OF WASHINGTON HAS CONSTRUED THIS AND COGNATE STATUTES TO REQUIRE ACTUAL DELIVERY UPON THE LIENED PREMISES AS A PREREQUISITE TO A LIEN.

*Huttig Bros. vs. Denny Hotel Co.*, 6 Wash. 122; 32 Pac. 1073;
*Fuller vs. Ryan* 44 Wash. 385; 87 Pac. 485;
*Gate City Lbr. Co. vs. Montesano*, 60 Wash. 586, 111 Pac. 799;
*Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74; 180 Pac. 901.

See also:

*Jacobs Co. vs. Brandt*, 44 Wash. 68; 87 Pac. 43;
*Crane Co. vs. Farandis*, 46 Wash. 436; 90 Pac. 1134;
*Tsutakawa vs. Kumamoto*, 53 Wash. 231; 101 Pac. 869;
*State Bank vs. Ruthe*, 90 Wash. 636; 156 Pac. 540;
*Ashford vs. Iowa & M. Lbr. Co.*, 81 Neb. 561; 116 N. W. 272;
*Foster vs. Dohle*, 17 Neb. 631; 24 N. W. 208;
*Baker Lbr. Co. vs. Marathon Paper Co.*, 130 N. W. 866; 36 L. R. A. N. S. 875.

5. THERE CAN BE NO LIEN SO LONG AS TITLE TO THE MATERIALS FOR WHICH A LIEN IS CLAIMED REMAINS IN THE CLAIMANT.

(a) The theory of such liens is that the labor or material has gone into and enhanced the value

of the premises or structure against which the lien is claimed.

*Lipscomb vs. Exchange Nat'l Bank*, 80 Wash. 296;

*Foster Lbr. Co. vs. Sigma Chi Chap. House*, 97 N. E. 801 ,at p. 803 (Ind.).

(b) The term "furnish" in the lien statute imports a sale and delivery.

*Burns vs. Sewell*, 51 N. W. 224;
*Baker Lbr. Co. vs. Marathon Paper Co.*, 130 N. W. 866; 36 L. R. A. N. S. 875;
*Barnett vs. Stevens*, 43 N. W. 661;
*Foster Lbr. Co. vs. Sigma Chi Chap. House*, 97 N. E. 801;
*Richmond Const. Co. vs. Richmond R. Co.*, 68 Fed. 105, at p. 118;
*Williams vs. Chapman*, 65 Am. Dec. 669;
*Loonie vs. Hogan*, 61 Am. Dec. 694.

6. TITLE REMAINED IN APPELLANTS AS TO ALL MATERIALS.

(a) Under appellants' contracts it was the intent that title should not pass until actual incorporation of the materials in the building. (See Articles II, V, XI, and XVII of the contracts, Tr. pp. 747 to 754.)

(b) Title never passes in absence of clear expression of such intent so long as anything remains to be done upon the article sold by the vendor.

35 Cyc. Sales, p. 229;
24 R. C. L., Sales, Sec. 293, p. 31;
*Clarkson vs. Stevens*, 105 U. S. 505; 27 L. Ed. 139;
*River Spinning Co. vs. Atlantic Mills*, 155 Fed. 466, at p. 471;
Annotation in 50 L. R. A. N. S. at p. 122.

(c) The contracts being entire, title could not have passed as to the materials completely manufactured without delivery while other materials forming an integral part of the same contract remained wholly or partially incomplete.

Annotation in 50 L. R. A. N. S., at page 128;
*North Pac. Lbr. Co., vs. Kerron*, 5 Wash. 214;
*Meeker vs. Johnson*, 3 Wash. 247, 28 Pac. 542.

(d) Delivery to appellant's storage was not such a delivery as effected a change in title.

35 Cyc., Cales, p. 304;
Annotation in 50 L. R. A. N. S., at p. 140;
*Pittsburgh C. & St. L. R. Co. vs. Hicks*, 19 Am. Repts. 713.

## ARGUMENT

### As to the Right of Lien

Under the authorities cited, which could be multiplied without limit, it seems idle to attempt to add words of argument based upon the evidence as to the correctness of the lower court's finding that

the shipment to Tacoma was for appellant's benefit and convenience, and to avoid a possible car shortage and increased freight rates.

Assuming that the court's finding will be sustained, for it is really based upon the appellant's own admission, and the conflict, if any, is a conflict in the appellant's own testimony, the case presented is one where there has been neither an actual delivery of any part of the materials to the building site nor any delivery under the contract such as will be effectual to pass title. This situation is fully discussed in our brief upon the appeal of the Tacoma Millwork Company, and there the cases cited by this appellant are also discussed and distinguished. Repetition of that argument and discussion under the circumstances would be burdensome. The request is therefore respectfully made that the authorities there cited and the argument there made be considred upon this appeal to all intents and purposes as though repeated at length here. We are serving that brief upon counsel for Washington Brick, Lime & Sewer Pipe Co., together with this one.

**Application of Payments**

The Building Company had no dealing with the Washington Brick Lime & Sewer Pipe Company outside of the contract directly involved in this appeal. In other words, there were no debts or obligations due from the Building Company to the

appellant except as created by the said contract. Furthermore at the time of the payment of $20,000 there was nothing due from the Building Company to the appellant according to the terms of the contract, for neither then nor at any time has there been a delivery of the material as contemplated by the contract and the agreement of the parties. But since this question is material only if this court takes a different view of the shipment of the terra cotta to Tacoma from that taken by the District Court and from that contended for by us ,we shall assume for the purpose of discussion of this question that the shipment to Tacoma did constitute a delivery. Upon that basis at the time of the payment of $20,000 there had been prepared and ready for shipment, though not actually shipped, $14,140 worth of material. In addition $15,360 worth of material had been burned and was being fitted preparatory to shipment. It was all but ready for shipment. The appellant in that situation made a demand for payment of seventy-five per cent of the total value of such material "as per terms of contract in Article V." (See Exhibit 143, Tr. p. 823.) That demand was not recognized in its entirety, but in accordance therewith $20,000 was paid. The demand made by said invoice and the payment based thereon amounts to a direction of application of the amount paid to the items specified.

See:

*Koehler vs. Bierbaum*, 122 S. W. 524, (Ky.).

Moreover it is well established that in the absence of direction or specific application by the creditor the law will apply the payment made to the oldest account.

> "It is undoubtedly the rule as is contended by appellant that if no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit; and if there be no direction or specific application by the creditor the law will apply it to the oldest account."
>
> *Hughes vs. Flint*, 61 Wash. 460, at 462; 112 Pac. 633.

There is no contention made by appellant that at the time this payment was made they made any specific application of it. Their contention is, if we understand it correctly, that after the payment had been made and after the failure of the Building Company, they could then apply the payment to work done by them subsequently to the time of payment, and for which they do not seriously contend they have any right of lien. Their contention is that where there are two debts, one secured and the other unsecured, and the payment is made by the debtor with no direction as to its application, the creditor may apply it to the unsecured debt. This rule presupposes the existence at the time of payment of two debts due and payable, one secured, the other unsecured,—a condition which did not

obtain at the time the $20,000 payment was made, and this fact distinguishes the authorities cited by counsel on pages 24 and 25 of their brief. The rule which governs in the particular facts of this case is as follows:

> "In the absence of an express agreement or an application by the debtor, the trend of authorities is to the effect that as between two debts, one due and one not due, the creditor has no choice, and the application must be on the former; and further a creditor cannot retain a payment to apply on future demands, leaving a prior debt unpaid."

24 R. C. L., Sales, Sec. 298, at p. 35;
*21 R. C. L. Payments*, Sec. 101, pp. 95 and 96;
*McWhorter vs. Bluthenthal*, 33 So. 52, 96 Am. St. Repts. 43 (Ala.);
*Cain vs. Vogt*, 116 N. W. 786, 128 Am. St Repts. 216 (Iowa);
*Bacon vs. Brown*, 4 Am. Dec. 640 (Ky.);
*Parks vs. Ingram*, 55 Am. Dec. 153 (N. H.);
*Sellick vs. Munson*, 16 Am. Dec. 689 (Vt.);
*Baker vs. Stackpoole*, 18 Am. Dec. 508.

What the appellant is really contending for here is the right to retain this payment, and after the failure of the Building Company apply it to the value of the work partially completed subsequent to August 13, 1920.

We suggest to the court that in the light of the

process of manufacture by the appellant, the history of which was detailed at great length, it is an irresistible inference that the terra cotta which was shipped to Tacoma comprised that included in the invoice appearing as Exhibit 143, though it is also true that additional material to that covered by that invoice was also shipped. If that inference be justified then the payment made must in its entirety go to the reduction of the amount claimed for the material in the appellant's storage at Tacoma.

Moreover such conclusion follows necessarily and as a matter of law from the decision of this court in *Columbia Digger Co. vs. Sparks*, 227 Fed. 780. That case was not a mechanic'c lien case, but involved the rights of a surety upon a bond furnished by a contractor upon a public work. The bond there was security for the payment of the claims just as in the present case the property under the mechanics lien law is security for the payment of liens. And it was held that the surety was entitled to have the payment made applied to the reduction of indebtedness which was a claim against the bond, notwithstanding an application by the creditor to a pre-existing indebtedness. The same equities exist in the present case in favor of the other lien claimants in this proceeding.

Wherefore we respectfully submit that the judgment of the District Court with respect to the appellant's claim was in all respects correct, and

should be affirmed, but that if any lien is to be allowed at all it cannot in any event, be for more than the value of the materials shipped to and now in storage at Tacoma, less the $20,000 payment.

Respectfully submitted,

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